IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-685

ABERDEEN AND ROCKFISH RAILROAD COMPANY, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,
Respondents.

PETITIONERS' REPLY TO BRIEFS IN OPPOSITION

RICHARD J. FLYNN
LEE A. MONROE
PETER J. VAGHI
SIDLEY & AUSTIN
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Attorneys for Petitioners

January 30, 1979

WILSON · EPES PRINTING CO., INC. · 789-0096 · WASHINGTON, D.C. 20001

TABLE OF CONTENTS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-685

ABERDEEN AND ROCKFISH RAILROAD COMPANY, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,
Respondents.

PETITIONERS' REPLY TO BRIEFS IN OPPOSITION

Petitioners, Aberdeen and Rockfish Railroad Company, *et al.*, pursuant to Rule 24 of this Court's Rules, submit the following as their reply to the briefs in opposition to their Petition for a Writ of Certiorari filed herein:

PRELIMINARY STATEMENT

The briefs in opposition filed by the Respondents and by certain intervening shippers rest principally on the contention that the decision of the Interstate Commerce Commission which, after consideration of the variable-cost/revenue relationships related to specific commodity groups, imposed selective holddowns is not reviewable. They contend that the Court of Appeals correctly dismissed the railroads' petition for review on the strength

of *Algoma* and subsequent cases which hold that Commission orders in general rate increase proceedings are not reviewable at the behest of shippers complaining of the application of a general increase to the rates on individual commodities.

This contention is misplaced; the reasons underlying the holding in *Algoma* and subsequent cases have no applicability to the circumstances presented in this case and, therefore, provide no support for the Court of Appeals determination that the Commission's order challenged by the railroad petitioners is not judicially reviewable.

I. THE *ALGOMA* LINE OF CASES IS INAPPLICABLE SINCE THE RAILROADS, UNLIKE SHIPPERS, HAVE NO ALTERNATIVE ADMINISTRATIVE REMEDY

Respondents contend that because shippers cannot obtain judicial review of Commission general increase orders insofar as the increase applies to the rates on individual commodities (*Algoma* and subsequent cases, see Petition, pp. 5-9), so too the railroads should, as a "corollary of that principle" (Respondent, p. 6), be denied judicial review of Commission orders in general increase proceedings imposing holddowns on selected commodities. This contention ignores both the nature of the proceedings conducted by the Commission in the investigative phase of Ex Parte No. 343 with respect to selected commodity groups and the significant differences in the availability of administrative remedies to shippers and to the railroads.

At the outset, it is important that this Court clearly understand the differences between the Commission's actions in this case and the actions found to be nonreviewable in other general rate increase cases. As all parties seem to agree, in a general rate increase case

the Commission has traditionally concentrated on the overall costs, and the consequent general revenue needs, of the carriers. To the extent that the Commission has imposed holddowns on increases for any particular traffic, such holddowns have been based on determinations either that, because of competitive conditions, the particular increase would not result in additional revenues for the railroads (thus not implementing the purpose of the general increase), or that, by virtue of voluntary "flag-outs" by the railroads, application of the increase to certain rates would result in discrimination. Such actions by the Commission have not led the carriers to seek judicial review, since these decisions have been the kind of tentative decisions reached in the context of a general rate increase proceeding.

In this case, by contrast, the Commission elected to undertake an investigation into the justness and reasonableness of the resulting rates on seven specific commodity groups, based upon consideration, not of general cost increases and revenue needs of the carriers, but of the specific costs and revenues allegedly related to those commodity groups.

Under the Commission's prior practice, the consideration of such issues would have been left to proceedings instituted by the affected shippers and receivers pursuant to Sections 13 and 15 of the Act. And the results of such proceedings would, unarguably, have been subject to judicial review at the instance of either the shippers or the carriers.

Here, the Commission has undertaken precisely the kind of particularized inquiry with respect to the commodity groups at issue which would arise in a proceeding instituted under Sections 13 and 15, not the broad review of carrier revenue needs, unrelated to particular rates or particular commodities, which is the hallmark of the conventional general revenue proceeding. Having elected to proceed in this fashion, the Commission now

seeks to preclude review of its action by relying solely on the fact that this specific investigation of the justness and reasonableness of the resulting rates on specific commodities was conducted as an adjunct of a general revenue proceeding.

The *Algoma* cases rest on the proposition that shippers, complaining of the application of a general increase to the rates on individual commodities, have available to them administrative remedies which can be utilized to challenge the individual commodity rates (as increased) and that those remedies must be exhausted. Respondents contend that the railroads too, in the event the Commission holds down the increase in respect of certain commodities, have alternative remedies available to them which must be exhausted. Specifically, Respondents contend that the railroads, when confronted in a general increase proceeding with a Commission-ordered hold-down affecting the rates on a particular commodity, may start all over again by filing an individual tariff of increased rates as to that commodity under Section 6(3) of the Act and thereby secure a hearing under Section 15(8). This, Respondents contend, is the administrative equivalent of the complaint which a shipper may file under Section 13(1) and the hearing he may thereby obtain under Section 15(1).

The Respondent's contention is untenable. There are significant defferences between the administrative relief available to shippers and the illusory "relief" available to carriers which both the Respondents and intervenors ignore.

The general rate increase proceeding, as opposed to the filing of literally thousands of individual tariffs of increased rates, has been justified on the basis of the practicalities involved and the need for prompt action to meet the overall revenue needs of the carriers when faced with cost increases which affect their general business, rather than the costs of providing specific services. The

use of general rate increase, or general revenue needs, procedure has been judicially sanctioned when "accompanied by suitable reservation of the rights of all interested parties to secure modification of any particular rate which, when challenged, is found to be unjust or unreasonable." *United States* v. *Louisiana*, 290 U.S. 70, 77 (1933). For this reason, the Commission conventionally states in its general increase authorizations, as it did in the Ex Parte No. 318 proceeding, for example, that

> ". . . our findings apply to the general bases of rates and charges and do not preclude interested parties from bringing any maladjustments to our attention for correction. The increased freight rates and charges authorized herein are not considered as prescribed and will be subjected to complaint and investigation as provided by the Interstate Commerce Act" (*Increased Freight Rates and Charges—1976*, —— I.C.C. ——, —— (1976)).

Thus, the rights of shippers to proceed by complaint to secure administrative consideration of justness and reasonableness of specific rates or rates for an individual commodity are carefully preserved.

The rights of the shippers are substantial. They may, as noted, file a complaint under Section 13(1) of the Act challenging the lawfulness of the individual commodity rate (as increased) and obtain a hearing under Section 15(1). If the Commission finds the challenged rate to be unlawful, it may prescribe lawful rates for the future and either require refunds or award reparations for excess charges paid with respect to prior shipments. Shippers are generally protected in general increase proceedings by the imposition of the refund rule; indeed, such a rule is now mandated by statute (49 U.S.C. § 15 (8) (e)).[1]

[1] Prior to enactment of the 4-R Act in 1976, the imposition of a refund rule was left to the Commission's discretion.

In contrast, the railroads have no such protection; and unless they can secure review of a particularized inquiry into the reasonableness of rates for specific commodities such as that made here, they may be effectively and permanently denied the benefit of the increased rates with respect to the affected commodities for a substantial period of time, even if the Commission erred. Here, the Commission selected the rates on seven commodity groups for investigation and, although the Commission did not suspend the increase for the statutory seven-month period (49 U.S.C. § 15(8)(b)), the railroads were denied substantial revenue when at the conclusion of its investigation the Commission found that the rates on those commodities, increased by more than three percent in some instances and two percent in others, were not just and reasonable and directed the railroads to make appropriate refunds.[2] Respondents now contend that the railroads are not entitled to judicial review of the Commission's action because they have an alternative administrative remedy—the right to file individual tariffs of increased rates, and "thus to trigger a particularized inquiry [under Section 15(8)] that may be judicially reviewed" (Respondents' Brief, p. 6). In other words, the railroads can't complain, even though they are denied review of the Commission action which denies them a revenue increase, because they are free to start the process of seeking an increase all over again.

The alleged administrative remedy provided by the right to refile its proposed rate increase is at best illusory. The railroads have already been denied the

[2] The Commission's action in Ex Parte 343 stemmed from its erroneous interpretation of the 4-R Act as necessitating a de-emphasis of the role of the general increase in railroad rate-making. Respondents contend that that interpretation is not subject to judicial review as it is only an "incidental expression of policy." The Commission's interpretation cannot be so characterized; it is that interpretation which prompted the Commission to assume for itself "the ability to impose holddowns and exceptions where necessary in a general increase proceeding."

benefit of the increased level of rates for the period consumed by the Commission's Ex Parte 343 investigation. If the railroads should file individual tariffs of increased rates with respect to these commodity groups, they face a seven- to ten-month suspension of the proposed increase, resulting in a further loss of revenue, even if the increases are found to be justified (49 U.S.C. § 15(8)(a)). Thus, under the so-called remedy advocated by Respondents, the railroads could be required to wait as long as fourteen, and possibly even twenty months to secure relief. At the end of that period, if the Commission finds the increased rates to be justified, the railroads may then begin charging that rate—but prospectively only. During that entire period of suspension and investigation, the railroads, unlike shippers who can be made whole by refunds or reparations, will have been deprived of substantial revenues which can never be recovered.

The *Algoma* cases which deny judicial review to shippers, who do have alternative remedies and are fully protected both by the refund rule and by entitlement to reparations, provide no support for non-reviewability of the instant Commission order imposing holddowns on selected commodities after a particularized investigation of the justness and reasonableness of rates on those commodities. Clearly, such orders are final for the purposes of judicial review. *City of Chicago* v. *United States*, 396 U.S. 162 (1969).

II. THIS CASE SHOULD BE CONSIDERED WITH THE *SEABOARD ALLIED MILLING* CASE NOW PENDIN BEFORE THIS COURT

The sole reason assigned by Respondents for contesting the reviewability of the order at issue here is that it arose in connection with a general revenue proceeding. These same respondents, however, have recently taken the position before this Court that this factor is irrelevant to the question of reviewability.

On January 8, 1979, this Court granted certiorari to review a decision of the United States Court of Appeals for the Eighth Circuit holding that the Commission's refusal to investigate, or a decision to terminate an investigation, of a rate proposal is a reviewable order. *Southern Railway Company* v. *Seaboard Allied Milling Corp., et al.* (No. 78-575 and related Nos. 78-597 and 78-604).[3] In this case, Respondents, in support of their contention that an order imposing selective holddowns in a general increase proceeding after a particularized investigation of the justness and reasonableness of the resulting rates is not reviewable, assert that "there is a recognized distinction between review of the ordinary mechanism for seeking and obtaining increases in rail carrier rates and review of the mechanism used in this case, which is known as a 'general revenue proceeding'" (Respondents' Brief, p. 4). However, in the *Seaboard Allied Milling* case, which involved individual commodity rate increases, these same Respondents have asserted that this distinction has no bearing on reviewability:

> "The *Asphalt Roofing* case is technically distinguishable from the present decision on the ground that it involved a general revenue increase and implicated questions of the Commission's judgment, whereas the present case involves a more narrow rate proposal and rates that arguably are unlawful on their face. *This distinction will not stand up, however, because the threshold question in both cases is the court of appeals' jurisdiction to examine the Commission's decision*" (Memorandum for the United States, p. 5, fn. 6; emphasis added).
>
> "*Asphalt* was a general revenue proceeding involving across-the-board rate increases applicable to all commodities, while the present case involved proposed rate changes limited to specified commodities. *But that distinction has no bearing on the reviewability issue*" (Petition for Writ of Certiorari in No. 78-597, p. 17; emphasis added).

[3] The Eighth Circuit decision in the *Seaboard Allied Milling* case expressly conflicts with that of the District of Columbia Circuit in *Asphalt Roofing Manufacturers Ass'n* v. *I.C.C.*, 567 F.2d 994 (1977), holding that orders permitting railroad rates to go into effect without suspension or investigation are unreviewable.

The fact that both Respondents have denied that the difference between individual and general rate cases has any relevance to the reviewability of Commission orders in successfully seeking review of *Seaboard Allied Milling* by this Court is a clear and compelling reason why this Court should disregard Respondents' attempted reliance on such a distinction in opposing the present petition for certiorari. Indeed, Petitioners believe that certiorari should be granted and this proceeding reviewed in conjunction with the proceedings in the *Seaboard Allied Milling* case in order that this Court can clarify the scope of reviewability of the Commission's rate actions by resolving the issues presented by each of these proceedings.[4]

CONCLUSION

For the reasons stated herein and in the Petition itself, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

RICHARD J. FLYNN
LEE A. MONROE
PETER J. VAGHI
SIDLEY & AUSTIN
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Attorneys for Petitioners

January 30, 1979

[4] Petitioners would of course comply with the briefing schedules applicable in the *Seaboard Allied Milling* case.